

1
2
3 BEFORE THE PUBLIC UTILITY COMMISSION
4 OF OREGON
5 UW 120
6

7 In the Matter of)
8 CROOKED RIVER RANCH WATER) CRRWC'S RESPONSE TO STAFF'S
COMPANY) MOTION TO COMPEL
9)
10)
11)

12 **INTRODUCTION**

13 On June 6, 2008, the Public Utility Commission of Oregon (Staff) filed a Motion to Compel
14 production of materials in response to Staff Data Requests No. 166, 167, 170, 171, 173, 174, and
15 175. CRRWC hereby responds to the Staff Motion to Compel.

16 **DISCUSSION**

17 **Data Request No.'s 166 & 167:** On DR's 166-167 some material requested may be
18 obtained as a matter of public record from the court's file for disputes that have resulted in
19 litigation. This would include sub-parts (a), (c) and (d) of DR 167 for the respective cases of:

20 1. Ruby Berrey v. Crooked River Ranch Water Company, and James Rooks, Rick Keen,
21 John Combs, Randy Scott and Brian Elliot (individually) Jefferson County Case No. 06CV-
22 0055.

23 2. Crooked River Ranch Water Company v. Public Utility Commission of Oregon, Court
24 of Appeals Case No. A134177

25 3. Crooked River Ranch Water Company v. CRR Club and Maintenance Association,

1 Jefferson County Case No. CV08-0028.

2 By asking for invoices in order to determine the amount and an explanation to determine
3 the related purpose of the legal expenditure the PUC is inquiring into both the identity of the
4 client and the fee arrangements with counsel both of which are protected under Rule 503, ORS
5 40.225.

6 The Attorney-Client privilege is the oldest of all evidentiary privileges and is recognized
7 in every American Jurisdiction. The Attorney-Client privilege is necessary to achieve its
8 purpose of encouraging clients to make full disclosure to their attorneys. With Data Request 167
9 the PUC is seeking to determine the identity of the client. Whether the fact of representation is
10 within the privilege was addressed in *State v. Keenan/Waller*, 91 Or App 481, 485, 756 P2d 51
11 (1988), *aff'd*, 307 Or 515, 771 P2d 244 (1989), where the Court of Appeals stated: “It is difficult
12 to see how the fact of representation might be privileged when it is clear that a client who hires
13 or discharges an attorney necessarily anticipates that the attorney will tell others who need to
14 know whether the attorney represents the client.” However, the Oregon Supreme Court opinion
15 in the same case went on to distinguish the Court of Appeals opinion by extending the privilege
16 when disclosure of the communications sought would “amount to disclosure of their substance.”
17 *State v. Keenan/Waller*, 307 Or 515, 522, 771 P2d 244 (1989).

18 Data Request 167 clearly seeks an explanation of the legal services provided by the listed
19 attorneys which is prohibited by the holding in *Keenan/Waller* as well as the federal holding in
20 *Tornay v. United States*, 840 F2d 1424, 1428 (9th Cir 1988), holding that the privilege applies
21 where disclosure of the client’s identity or the existence of a fee agreement “would reveal
22 information that is tantamount to a confidential professional communication.”

23 Data Request 166 requests the actual invoices. Under Federal case law, the exception to
24 the privilege allowing the identity of the client to be revealed has been extended to include the
25

1 fee arrangement between the client and the lawyer. *United States v. Sherman*, 627 F2d 189 (9th
2 Cir 1980) (fee arrangement); *United States v. Hodge and Zweig*, 548 F2d 1347 (9th Cir 1977)
3 (identity of client and fee arrangement). The request by the PUC for the invoices themselves
4 would be tantamount to disclosure of the fee arrangements themselves.

5 **Data Request No.'s 170, 171, 174, 174, 175;** The foregoing data requests all seek
6 production of various Board of Director resolutions, minutes and other actions. This same
7 information was requested by Intervener, Craig Soule in Jefferson County Case No. CV08-0028.
8 The Petitioner in that matter filed a Motion and Order to Show Cause why the Respondent
9 should not be held in contempt of court for failure to produce documents responsive to
10 Petitioners data requests which include requests for copies of board minutes and resolutions.
11 The Jefferson County Circuit Court ruled that the information requested was not relevant and
12 that the requests amounted to an attempt to micro-manage the business of CRRWC. The court
13 concluded that it was beyond the scope of the Petitioners authority as an intervener.

14 CRRWC believes that it is likewise outside the scope of the PUC's authority. This
15 position is consistent with both the prior statements of the PUC Staff and the Commission. Data
16 Request 170 specifically asks for the Board Resolution authorizing the General Managers pay
17 increase. Throughout the proceeding to establish rates CRRWC protested that the rates which
18 Staff sought to establish would not be enough to maintain the current level of pay for employees.
19 Staff's consistent, albeit logically flawed, response was that the Commission does not set
20 employee compensation only appropriate rates. "The General Manger is concerned that any
21 disallowance of overtime would result in a violation of his employment service contract. This is
22 not the case. The rates established by the Commission does not nullify the contract and the
23 Board has the option of continuing the contract at the present rates..." Testimony of Michael
24 Dougherty/23 Staff 100, Docket UW 120. Michael Dougherty goes on to cite Commission

1 Order No. 07-359 (UW 119) pages 5 an 6:

2 A rate cases sets only one amount: the rates the utility may charge its
3 customers. The rates are designed to allow recovery of reasonable amounts of
4 expenses ans provide a reasonable return on investment. Employee salaries are
5 an expense included in the computation at a level deemed reasonable. That level
6 is what will be recovered. If a utility decides to pay a salary at a higher rate than
7 used to compute the rates, it is free to do so, but the amount in excess of the figure
8 used to compute the rates will not be paid by it's customers. Another way of
9 putting it would be to say that a rate case does not establish a "budget" for a
10 regulated utility. The utility may incur expenses at any level different from those
11 used in the rate case but it cannot raise rates to do so.

12 Based upon the unequivocal statements by both Staff and the Commission the inquiry under DR
13 170 is outside the scope of the PUC's jurisdiction. The remaining DR's all relate to non-salary
14 based action by the Board of Directors and are outside the jurisdiction of the PUC based on the
15 aforementioned ruling of the Jefferson County Circuit Court.

16 RESPECTFULLY submitted this 16th day of June, 2008.

17 GLENN, SITES, REEDER & GASSNER, LLP

18 /s/ Timothy R. Gassner
19 TIMOTHY R. GASSNER OSB 02309

1 CERTIFICATE OF SERVICE

2 I certify that on June 16th 2008, I served the foregoing upon the following, by mailing a
3 copy by postage prepaid first class to:

4 Charles G. Nichols
5 PO Box 1594
6 Redmond, OR 97756

Crooked River Ranch Water Co.
Brian Elliott, President Board of Directors
PMB 313-1604 S. Hwy 97
#2
Redmond, OR 97756

7 Public Utility Commission of Oregon
8 Michael Dougherty
9 550 Capitol St. NE
10 Ste. 215
11 Salem, OR 97301

James R.Rooks, General Manager
Crooked River Ranch Water Company
PO Box 2319
Terrebonne, OR 97760

12 Steven Cook
13 PO Box 1111
14 Terrebonne, OR 97760

Department of Justice
Jason Jones
Regulated Utility & Business Section
1162 Court St. NE
Salem, OR 97301-4096

15 Craig Soule
16 11953 SW Horny Hollow
17 Terrebonne, OR 97760

18 /s/ Timothy R. Gassner
19 TIMOTHY R. GASSNER OSB 02309
20 GLENN, SITES, REEDER & GASSNER, LLP
21 205 SE 5th St.
22 Madras, OR 97741
23 (541) 475-2272
24 Fax: 541-475-3394